STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

Case No. 2545-2005

IN RE INFORMATION REQUEST BY KTVM-TV

Final Agency Decision Re Information Request

I. INTRODUCTION

In this matter, KTVM-TV seeks disclosure of the Final Investigative Report issued by the Montana Department of Labor and Industry Human Rights Bureau on Robin Potera-Haskins' Human Rights Act complaint of illegal discrimination against Montana State University-Bozeman and university president Geoffrey Gamble. Potera-Haskins objected to the disclosure and KTVM-TV requested review of the department's refusal to comply with the requested disclosure of the investigative report. Admin. R. Mont. 24.8.210(2)(b) through (3). Based on the arguments of the parties in their briefs and oral arguments and an *in camera* review of the investigative report, the hearing examiner issues this final agency decision.

II. FINDINGS OF FACT

1. Montana State University-Bozeman hired Robin Potera-Haskins as head basketball coach of its NCAA Division I women's basketball team in April 2001. The university terminated her employment on April 8, 2004. On October 4, 2004, she filed a complaint of unlawful sex discrimination and retaliation with the Montana Department of Labor and Industry Human Rights Bureau (HRB), against the university and its president, Geoffrey Gamble.

2. On October 28, 2004, KTVM-TV, Bozeman, Montana (KTVM), requested that HRB disclose all information available regarding Potera-Haskin's discrimination suit against the university. HRB gave written notice of that request to the parties to the complaint, and received timely objections to the disclosure. A contested case proceeding on the request followed, with a final agency decision issuing on February 25, 2005. The decision made public a redacted copy of Potera-Haskins' complaint and a redacted copy of the university's response to the complaint. The parties to that proceeding did not seek judicial review.

3. On April 1, 2005, HRB issued its Final Investigative Report (FIR) regarding the complaint.

4. On May 11, 2005, KTVM-TV, Bozeman, Montana, requested in writing that HRB disclose the FIR on Potera-Haskins' complaint. On May 12, 2005, HRB gave written notice of the request to the parties to the complaint. Within 10 days, Potera-Haskins objected in writing to the disclosure, arguing that she had privacy rights regarding confidential disciplinary or investigative proceedings concerning her former employment which outweighed the public's right to know. The university also submitted a privacy objection regarding student information in the FIR. On the basis of the objections, HRB denied the request. KTVM requested a review of the denial, and the matter came to the Hearings Bureau.

5. On June 21, 2005, the Hearings Bureau issued a notice of hearing and telephone conference in this matter. On July 5, 2005, during that conference, the parties agreed that an evidentiary hearing would be unnecessary and the hearing examiner set a briefing schedule regarding the disclosure issues. The university withdrew its objections to disclosure and did not participate further in this proceeding. Counsel for Potera-Haskins and KTVM submitted their briefs and argued the case by telephone on August 4, 2005. The hearing examiner advised both counsel during the argument that he had also done an *in camera* review of the FIR.

6. The FIR identifies one university student, by name and by family connection to an employee of the university, and discusses potentially private information about her. There are no indications or findings that the student-athlete was accused of doing or did anything wrong.

7. The FIR identifies a number of university students, members of the women's basketball team, as "Player A," "Player B," etc., and also refers to two student-athletes by race only. There are no indications or findings that any of these student-athletes were accused of doing or did anything wrong.

III. DISCUSSION

This public information request case involves whether the privacy rights of Potera-Haskins clearly outweigh the merits of the public's right to know what HRB, a public agency, decided and why, as reflected in the FIR.

The Montana Supreme Court has held that "[b]oth the public right to know, from which the right to examine public documents flows, and the right of privacy,

which justifies confidentiality of certain documents, are firmly established in the Montana Constitution." *Citizens to Recall Mayor James Whitlock v. Whitlock* (1992), 255 Mont. 517, 521, 844 P.2d 74.

Article II, Section 9, of the Montana Constitution provides:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Article II, Section 10, of the Montana Constitution provides:

> The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

The right to know is not absolute. "The right to know provision was designed to prevent the elevation of a state czar or oligarchy; it was not designed for . . . the tyranny of a proletariat." *Missoulian v. Board of Regents* (1984), 207 Mont. 513, 530, 675 P.2d 962, ***quoting*** *Mtn. States T. and T. v. Dept. Pub. Serv. Reg.* (1981), 194 Mont. 277, 289, 634 P.2d 181. The Human Rights Commission and the department have recognized the need to balance the competing interests of the public's right to know and the individual's right to privacy and have adopted a method for that balancing. Admin. R. Mont. 24.8.210.

Resolving the conflict between the public's right to know and the individual's right to privacy requires the department "to balance the competing constitutional interests in the context of the facts of each case, to determine whether the demands of individual privacy clearly exceed the merits of public disclosure. Under this standard, the right to know may outweigh the right of individual privacy, depending on the facts." *Missoulian,* ***supra at*** 529 (original emphasis). The two levels to the inquiry are: (a) analyzing the asserted privacy interests and (b) weighing whether the individual privacy demands clearly exceed the merits of public disclosure of the FIR.

a. Existence and Nature of the Asserted Privacy Rights

There is a two-part test to determine whether individuals have privacy interests protected by the Montana Constitution: (1) whether involved individuals have a subjective or actual expectation of privacy and (2) whether society recognizes that

expectation as reasonable under the circumstances. ***E.g.***, *Engrav v. Cragun* (1989), 236 Mont. 260, 262, 769 P.2d 1224; *MHRD v. City of Billings*, ***op. cit.***

Several categories of people may have potential privacy rights at issue in this case, because of the contents of the FIR. Although only Potera-Haskins has maintained her objection to the disclosure, the university withdrew its objection (which was based upon concerns about student privacy interests), with the understanding that student names would not be disclosed. No students were parties to the underlying investigation–therefore, no students had notice and opportunity to object to disclosures about them. The hearing examiner will consider both of these categories of potential privacy demands.

The FIR is also replete with names of non-students, both employees of the university and others, who were interviewed or otherwise became involved with the investigation. However, the information did not come from personnel files or other such normally confidential sources. Instead, the information discovered during the investigation came from statements of parties and witnesses, which sometimes involved allegations of wrongdoing by the non-students, reports of their negative interactions with others and negative comments about them by others or about others by them. Certainly, some of these persons might have hopes that such matters would not become public. However, they cannot have a subjective or actual expectation of privacy that society recognizes as reasonable when such matters are included in a FIR that finds either merit or lack of merit in a claim of illegal discrimination. Thus, the detailed discussion that follows is limited to the privacy claims of Potera-Haskins and the potential privacy claims of student-athletes.

a.1. Potera-Haskins' Privacy Rights

Balancing individual privacy interests against the public's right to know, the Court has "carefully guarded against public scrutiny of very private and personal matters." *Whitlock* ***op. cit. at*** 522, ***citing*** *Flesh v. Mineral and Missoula Counties* (1990), 241 Mont. 158, 786 P.2d 4, depending upon the facts of the particular situation, as already noted. *Missoulian,* ***op. cit. at*** 529; *MHRD v. City of Billings*, ***op. cit.*** The FIR references Potera-Haskins performance evaluations and corrective actions by the university regarding Potera-Haskins, as well as critical comments about her performance. This is information that the Court has sometimes found to be constitutionally protected, because society recognizes the expectations of privacy as reasonable. *Missoulian*, ***op. cit.***

On the other hand, society does not recognize as reasonable the expectations of public employees in positions of trust that their personnel information will remain private regarding accusations of wrong-doing. *Whitlock*, ***op. cit. at*** 522-23, ***citing*** *Great Falls Trib. v. Cascade County Sheriff* (1989), 238 Mont. 103, 775 P.2d 1267, 1269 ("for example . . . police officers have a subjective or actual expectation of privacy relating to disciplinary proceedings against them, [which] was not one which society recognized as a strong right . . . .' *Great Falls Tribune*, 775 P.2d at 1269.").

Peace officers with far lower salaries than college coaches, hold positions of public trust, because of the nature of their work and responsibility. When they are subject to disciplinary proceedings, society does not always recognize their privacy expectations as reasonable.

Potera-Haskins was a varsity intercollegiate basketball coach for a state university. She received $10,000.00 a year, around 15% of her salary, as a media promotion fee. Her work, her successes and her failures were extremely public. In this society, today, her job was that of a public employee in a position of trust. No college coach has the primary obligation to enforce and uphold the law. However, state college varsity intercollegiate coaches, because their positions are so public, because they are often the subjects of media scrutiny, because their performances are held up in public and closely evaluated, also hold positions of public trust. The trust, in this job, involves juggling the need to win with the need to deal appropriately with student-athletes, school administration and the public.

Additionally, Potera-Haskins effectively conceded in her brief that when she filed her discrimination complaint she knew that one consequence might be ultimate disclosure of personnel information regarding the university's dissatisfaction with her performance. She argued that until she elected to proceed beyond the FIR to either administrative or judicial adjudication, she still retained a reasonable expectation of privacy. She may have had such an expectation, but it was not reasonable.

HRB was entitled to obtain private information about individuals necessary for its investigation into Potera-Haskins' discrimination complaint. HRB could have required the production of all information regarding Potera-Haskins pertinent to the case. Mont. Code Ann. § 49-2-203. The power to obtain such information arises out of the state's compelling interest in preventing illegal discrimination.

Article II, Section 4, of the Montana Constitution states:

> The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm,

corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.

The Human Rights Act is a law in furtherance of this constitutional right.

Providing personnel information to HRB did not, in and of itself, waive individual privacy rights, even when it was provided without legal compulsion. *Mt. H. R. Div. v. City of Billings* (1982), 199 Mont. 434, 446, 649 P.2d 1283. The mere fact that the information was in the hands of HRB did not mean any and all individual privacy rights were thereby lost.

However, the party prosecuting the charge could not reasonably expect that the respondent, in the face of allegations that it engaged in illegal discrimination, would withhold exculpatory information that might show that it had legitimate business reasons for its actions. Private personnel information about non-parties may well retain its protected status after the HRB investigation. Similar information about the charging party, proffered by the respondent and then either supported or rebutted in the investigation, cannot remain protected. It is fundamentally tied to the ultimate finding of either merit or lack of merit, and society does not consider it reasonable that a person prosecuting a discrimination claim would expect to maintain privacy of any of her personnel information that pertained either to her claim or to the defenses of the former employer.

a.2. Student-Athlete Privacy Rights

The FIR carefully circumscribes the names of student-athletes. The hearing examiner concludes that this was and is proper. These non-parties did not choose to put their private information at issue, and have retained their reasonable expectations of privacy. By leaving their names out of the FIR, HRB has protected their privacy, without gutting the recommendation by removing many of the reasons for it. Thus, for all of the unnamed student-athletes, no privacy problems arise.

There remains the problem of the student-athlete whose name was revealed. This problem arose in the previous proceeding. There is no longer any risk that revealing her name would interfere with the investigation, which has been completed. On the other hand, because she is not the target of any accusations of wrong-doing, the only question is whether negative comments about her, tied to Potera-Haskins' claims that she was forced to give preference to this student-athlete, are matters as to which the student-athlete has a subjective or actual expectation of privacy which society considers reasonable.

The hearing examiner concludes that this student-athlete does not have such expectations. It may be painful to be identified in public as a team member who allegedly got unfair preference. It may also be painful to be identified in public as allegedly receiving the unfair preference because of family associations. It is not at all clear that, as a matter of law, such identification is an invasion of her privacy.

b. Balancing the Individual Privacy Demands Against the Merits of Public Disclosure

Because Potera-Haskins did not establish a subjective or actual expectation of privacy which society considered reasonable, it is unnecessary to perform the balancing test. However, even if Potera-Haskins had established a subjective or actual expectation of privacy which society considered reasonable, that privacy demand would not clearly exceed the merits of public disclosure of this FIR. As already noted, the state has a compelling interest in preventing illegal discrimination. That interest carries even greater weight when the alleged discriminator is a public entity, accused by a public employee who held a very public position. The public has a right to know what HRB decided regarding the merits of this particular complaint (which is already a matter of public record, albeit in redacted form). That right is meaningless unless the public also has a right to know the basis upon which that decision was reached.

Potera-Haskins also argued that until she filed her discrimination claim, the university had not articulated the majority of its reasons for ending her employment. The hearing examiner cannot decide whether this argument is credible, because there has been no adjudication. However, since the FIR lists and explicates the university's reasons, and considers them in reaching its recommendation, it would be improper to truncate the FIR. The public interest in the investigative decision and its bases is not dependent upon whether or not merit is found. It is likewise not dependent upon whether or not the case proceeds to litigation in a public forum. Potera-Haskins asserted that until the case went beyond the investigatory finding and arrived in actual litigation she expected to maintain her privacy. She claimed that during the investigation the university made assertions she did not expect about her performance, and that this strengthened her privacy demand. Even if these were clearly facts, which this record does not establish, those facts do not satisfy the requirement that her privacy demand clearly exceed the merits of public disclosure.

Because there is no basis to conclude that the one student-athlete whose name appears in the FIR had a subjective or actual expectation of privacy which society considered reasonable, it is likewise unnecessary to perform the balancing test. In this instance, it would also be impossible to redact her name without also removing significant chunks of the FIR that would clearly identify her even without her name

appearing. Unfortunately, as HRB apparently also concluded, her identity, unlike that of the other student-athletes, cannot effectively be kept out of the FIR without depriving the public of a clear picture of the circumstances upon which HRB made its recommendation regarding the merit of the complaint. Whatever privacy interest she might demand, it does not clearly exceed the merits of public disclosure of this FIR.

IV. CONCLUSIONS OF LAW

1. The department has jurisdiction. Admin. R. Mont. 24.8.210.

2. The demands of individual privacy do not clearly exceed the merits of the public's right to know the contents of the FIR in the underlying case, which must therefore be available to the public.

V. ORDER

1. The Montana Department of Labor and Industry, Employment Relations Division, Human Rights Bureau's April 1, 2005, "Final Investigative Report" in *Robin Potera-Haskins v. Montana State University* and *Robin Potera-Haskins v. Dr. Geoffrey Gamble, President*, HRB Case Nos. 0059011247 and 0059011248, is a public record. The HRB shall release a copy of the FIR to KTVM-TV, Bozeman, Montana, and shall hereafter treat the FIR for all purposes as a public record.

2. This is a final agency decision of the department. Any party aggrieved by this decision can timely seek judicial review pursuant to the applicable provisions of the Montana Administrative Procedure Act, Mont. Code Ann. §§ 2-4-701 ***et. seq.***

DATED this 25th day of August, 2005.

DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR
Terry Spear , Hearing Examiner
Hearings Bureau
Montana Department of Labor and Industry

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